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Nos. —

In the Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE CEMENT INSTITUTE, ET AL.; AETNA PORTLAND CEMENT COMPANY, ET AL.; MARQUETTE CEMENT MANUFACTURING COMPANY; CALAVERAS CEMENT COMPANY, ET AL.; HURON PORTLAND CEMENT COMPANY; SUPERIOR PORTLAND CEMENT, INC.; NORTHWESTERN PORTLAND CEMENT COMPANY; RIVERSIDE CEMENT COMPANY, A CORPORATION; UNIVERSAL ATLAS CEMENT COMPANY; CALIFORNIA PORTLAND CEMENT COMPANY; MONOLITH PORTLAND CEMENT COMPANY, ET AL.; BLAINE S. SMITH, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Acting Solicitor General prays that writs of certiorari be issued to review judgments of the Circuit Court of Appeals for the Seventh Circuit entered in this cause on October 31, 1946, which set aside an order of the Federal Trade Commission requiring the respondents to cease and desist from various specified acts and practices which the Com-

mission had concluded were in violation of Section 5 of the Federal Trade Commission Act or Section 2 (a) of the Clayton Act.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 16761) is reported in 157 F. 2d 533.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on October 31, 1946 (R. 16823–16832). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. 45; under Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 41, and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence supports the findings of the Federal Trade Commission that respondents, who include practically all domestic producers of cement, had conspired to restrict competition by various means and methods, and particularly by the maintenance of a multiple basing-point, delivered-price system under which, in any given locality, the delivered price of all the respondents was identical.

2. Whether proof and findings that the respondents acted collectively to prevent such practices as might in any respect impair respondents' multiple basing-point delivered-price system for the sale of cement warranted the Commission in finding that

respondent had agreed and combined to maintain this pricing system, and whether a reviewing court may, on the basis of its own independent appraisal of the evidence, reject the Commission's finding of combination.

3. Whether the sales by respondents pursuant to a delivered price system under which they respectively sell to differently located customers at varying mill net prices constitute price discriminations prohibited by Section 2 (a) of the Clayton Act; and whether respondents, in systematically meeting but never going below the delivered prices of their respective competitors, are, as to their lower mill net prices, meeting "in good faith" the equally low price of a competitor, within the meaning of Section 2 (b) of the Clayton Act.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any

circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

(a) * * * it shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing

herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This is a proceeding brought by the Federal Trade Commission in July 1937 against The Cement Institute (referred to herein as the Institute), an unincorporated trade association organized in 1929; 75 corporations engaged in producing and selling cement,[1] each of them a member of the Institute; and the officers and trustees of the Institute.

The complaint filed by the Commission contains two counts. Count one charges that respondents have been parties to a combination to restrict and restrain price competition among the respondent producers, and that they have effectuated their combination by mutual understanding or agreement to sell cement solely at delivered prices under a multiple basing-point system of pricing which results in every producer having the same delivered price at any given destination point (R. 48, 54–55). The

[1] Six of the 75 do not themselves produce cement but each of the six acts as selling agent for a particular producer (Fngs. 1 (n), (2a), (2y), (3p), (3r), (3v), R. 15965, 15967, 15972, 15976, 15977, 15978).

count also charges that the respondents have supported their combination to restrict and restrain price competition by mutual understanding and agreement to employ certain means and methods, described in the complaint, which prevent or tend to prevent any departure from or impairment of respondents' multiple basing-point delivered-price system.[2]

Count two charges that the delivered prices, varying from locality to locality without reference to differences in transportation costs, at which each respondent producer sold, pursuant to the combination charged in count one, discriminated in price between purchasers in different localities, in violation of Section 2 of the Clayton Act (R. 218, 223–224, 241, 249).

After the taking of evidence and a hearing before the Commission, it filed detailed findings of fact in July 1943 (R. 15961–16132). The Commission concluded that the acts and practices set forth in its findings constitute unfair methods of competition prohibited by the Federal Trade Commission Act and price discriminations prohibited by Section 2 (a) of the Clayton Act (R. 16132). The order issued by the Commission directs respondents to cease and desist, in connection with interstate sales of cement, from participating in "any planned common course of action," understanding, agreement, or conspiracy—

(1) To quote or sell cement at prices determined pursuant to the multiple basing-point delivered-

[2] R. 91–93, 117, 128, 133, 144, 153, 160, 164, 171, 177.

price system or pursuant to any other system which results in identical prices or price quotations by those using the system;

(2) To perform or engage in certain specified acts or practices in aid or support of any plan or system prohibited by paragraph (1) above.

(3) To discriminate in price between customers by systematically charging "mill net prices" which differ by the amounts necessary to produce delivered prices to purchasers identical with the delivered prices available to the same purchasers on purchases from other respondents;

(4) To use any means substantially similar to those set out in the order with the purpose or effect of accomplishing anything prohibited by the order (R. 16133–16137).

On petitions to review the Commission's order (R. 16138–16232), the court below heard the cases together, and on September 20, 1946, rendered an opinion holding the Commission's order to be void in its entirety (R. 16761–16816). One judge, dissenting, was of the opinion that the order should be affirmed (R. 16816–21).[3]

The opinion of the court below is severely critical of the reasoning of the Commission,[4] the assumed

[3] The dissent notes that if the evidence fails to show that one or more of the respondents is a party to the combination found by the Commission the order should be modified so as not to apply to such respondent or respondents (R. 16821).

[4] As to the arguments or reasoning of the Commission, the court uses such expressions as "the most illogical of all," one which the court is "unable to comprehend," "another exag-

objectives of the Commission, and the assumed effects of its order.[5] But the court, apart from its holding that there was no justification for the finding that respondents had combined to sell under the multiple basing-point delivered-price system, rejected as unsupported by evidence only one minor finding (R. 16805–6), of findings which cover 170 pages in the printed record. It is therefore appropriate to summarize the facts as found by the Commission:

There are approximately 80 producers of cement in the United States and they operate about 150 mills. These mills are scattered throughout the country, both because the raw materials necessary for production are available in many parts of the United States and because cement is a heavy and bulky commodity and the cost of transporting it from point of manufacture to point of use is high. (Fng. 3 (a), R. 15980.)

For a long period of time cement producers have been organized in national and regional trade associations. One association, organized in 1902, grew in size and strength until its membership included substantially all domestic producers. The

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gerated contention," "borders on the absurd" (R. 16792, 16798, 16805). Reliance by the Commission on activities of the respondents during the N. I. R. A. period, the court said, "would constitute a fraud, or perhaps confidence game would be a more appropriate designation" (R. 16779).

[5] As to the assumed purposes of the Commission, see R. 16768–9. As to the assumed effects of the order, see R. 16791–2, 16794, 16815.

Cement Manufacturers Protective Association was organized in 1916 and remained active until shortly before the decision of this Court in *Cement Manufacturers Assn.* v. *United States,* 268 U. S. 588. The respondent Institute, which has been active since its organization in 1929, includes in its membership substantially all domestic producers and is an effective vehicle for formulating and executing collective plans and purposes. (Fngs. 4 (c), 5, R. 15982, 15983.)

Five of the respondent producers operate a total of 49 mills, which have a productive capacity in excess of one-third of the total national capacity. These respondents and five others control more than one-half of the productive capacity of the industry. There are also substantial relationships among a number of the respondent producers. This control of a large proportion of the industry by a relatively few individuals has aided in creating and maintaining unity of purpose among respondents. (Fng. 4 (a), (c), R. 15981–2.)

Throughout a long period the cement industry has evinced a strong aversion to competition. The belief has developed and is now generally held that free and open competition is impracticable for this industry, and that no producer should attempt to excel others in quality, price, or terms of sale.[8] The members of the industry have, by understandings

[8] Cement is customarily sold by respondents upon the basis of service, entertainment of the buyer, and personal relationships (Fng. 6 (c), R. 15987).

and agreements, developed and maintained substantial uniformity of action with respect to practically every marketing procedure involving price or other competition. Some of the current practices, which respondents designate as "customs of the trade," originated in agreements made many years earlier and have persisted in substantially their original form through the support of collective action. (Fngs. 6 (a), (b), R. 15983–4.)

Respondents use the following price system in substantially all of their sales: The majority of mills are what is known as base mills.[7] Such a mill establishes a base price at its mill and sells at delivered prices which are calculated by adding to its base price the all-rail freight rate from the mill to destination. However, at any place where the delivered price of another mill, calculated in the same way, is lower, the first mill adopts such lower price as its delivered price. The non-base mill uses the same system except that, not having any mill base price of its own, the delivered price at which it sells at every place, including its home location, is the lowest price produced by combining the base price of any mill and the freight rate from the mill. (Fngs. 7 (a)–(c), R. 15988–9.)

Under the above system, in any given locality the delivered price of every producer is the same; in other words, the respondents all sell at identical prices (Fng. 7 (h), R. 15991). They do so even

[7] Compare R. 16787–8; Fng. 7 (b), R. 15988.

when submitting sealed bids to public agencies (Fng. 9 (b), R. 16023). The identity in bid price runs, when the formula so requires, to the fourth decimal of 1¢ (Fng. 9 (b), R. 16026–7). To cite one of numerous examples of identical bids, when the Illinois Highway Commission requested bids for delivery at 102 different destinations, the bid prices of the respondents were identical for 98 locations, one respondent was higher than the others at one destination, and one respondent was higher than the others at two destinations and lower at one (Fngs. 9 (c), R. 16028).[8]

Respondents' pricing system came into existence, and its territorial application was extended from time to time, as a result of understandings and agreements among cement producers, but the system, once put into operation, did not require renewed understandings or agreements to maintain identical delivered prices (Fng. 7 (h), R. 15991–2).

Respondents have engaged in many kinds of collective action with the effect and purpose of preventing departure or deviation from their pricing system. The action thus taken includes the following:

(1) Compilation and publication of rate books

[8] When a respondent by miscalculation or mistake bid lower than the basing-point formula provided, it sometimes sought to correct or withdraw its bid, and occasionally a respondent who did not wish to sell at the particular location but wished to retain his name on the list of bidders submitted a bid higher than that provided by the basing-point formula (Fng. 9 (d), R. 16028).

in order to assure that all producers use common freight factors for pricing purposes, and use of the rates thus published even though they do not correspond to the actual railroad freight charge and even though actual shipment is by water or motor truck (Fngs. 8 (a)–(g), R. 16006–13).

(2) Adoption of various devices to prevent differences in delivered prices, by reason of federal land grant rates, on sales to the Federal Government (Fngs. 8 (h)–(o), R. 16013–22).

(3) Establishment of involuntary or punitive bases, i. e., the establishment by a producer of a low base price at the mill of some other producer who has not adhered to the accepted price formula, thereby controlling the realization of the recalcitrant producer (Fng. 10, R. 16029–45).

(4) Action to eliminate, discourage, and control the trucking of cement by purchasers, because of its destructive effect upon the delivered price system (Fng. 11, R. 16045–55).

(5) Action to prevent customers from diverting cement while in transit (Fng. 12, R. 16055–9).

(6) Establishment and maintenance of uniform terms and conditions of sale (Fng. 14, R. 16065–71).

(7) Establishment of uniform practices as to sales to dealers, the definition of dealers, and the types of business they should be permitted to handle (Fng. 17, R. 16089–99).

(8) Action to prevent or restrict direct sales by producers to federal agencies (Fng. 18, R. 16099–16102).

(9) Boycott of dealers who handled imported cement (Fng. 19, R. 16102–4).

As to count two of the complaint, the Commission found that the actual prices at which respondent producers sold was the delivered price less the cost of transportation to place of delivery; that in selling on this basis the respective producers discriminated in price among their customers; that such price discriminations resulted from the respondents' combination to use the multiple basing-point delivered-price system; and that the use of this system for the purpose and with the effect of selling at identical delivered prices precludes the defense that the variations in the seller's mill net prices were made in good faith to meet an equally low price of a competitor (Fngs. 24 (a), (b), (d), R. 16127–8, 16129–30).

The lengthy opinion of the court below does not clearly state the grounds upon which it set aside the Commission's order. It appears that the principal grounds of decision are: (1) That the Commission did not find with sufficient definiteness that the respondents had agreed or combined to sell under the multiple basing-point delivered-price system and that, even if such a finding can be spelled out of findings which were made, it was predicated to an undisclosed extent upon incompetent or irrelevant evidence; and (2) that the findings and evidence as to the concerted action taken by respondents to prevent practices which might in any respect impair the functioning of their delivered-price system

did not warrant the Commission in inferring that respondents had agreed and combined to employ or maintain this pricing system. The provisions of the order relating to Section 2 (a) of the Clayton Act were apparently set aside upon the ground that the Commission erred in finding that respondents were not within the proviso of Section 2 (b) of the Clayton Act, which permits a seller to rebut a prima facie case of price discrimination by showing that his lower price was made in good faith to meet the equally low price of a competitor.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the Commission did not find that respondents have been parties to a combination to restrict competition by various means and methods and particularly by mutually agreeing to sell cement solely at delivered prices under a multiple basing-point system of pricing.

2. In holding that the findings of the Commission that respondents had acted collectively to eliminate or prevent practices which might impair the functioning of their multiple basing-point delivered-price system of selling cement are not sufficient to support a finding that respondents had agreed and combined to sell cement under this system.

3. In holding that if there are adequate findings of combination, they are not supported by the evidence.

4. In substituting for findings of the Commission the court's own judgment as to the facts estab-

lished by the evidence and as to the inferences properly to be drawn from the evidence.

5. In holding that the Commission had given improper consideration to evidence respecting agreements and activities of respondents prior to the organization of the Institute.

6. In holding that the Commission had given improper consideration to evidence respecting acts and practices of respondents during the period in which the National Industrial Recovery Act was in effect.

7. In holding incompetent the letter referred to in findings 7 (r) and 21 (f).

8. In holding that the Commission erred in concluding that each of the corporate respondents sold cement to its customers at discriminatory prices violative of Section 2 (a) of the Clayton Act.

9. In holding that the Commission erred in finding that respondents' discriminatory prices were not within the proviso to Section 2 (b) of the Clayton Act.

10. In vacating and setting aside the Commission's order.

REASONS FOR GRANTING THE WRIT

I

The question whether one of the country's basic industries may continue to market its product without any vestige of price competition is obviously of grave concern both to members of the industry and

to the public at large. The size of the record, the duration of the proceedings, and the three days of oral argument in the court below, show the importance of the outcome to the parties to the cause.[9] The court below, believing that the case was one warranting review by this Court, said that whereas it would return the case to the Commission to permit revision of the findings if this were "an ordinary proceeding," it would not do so because the question or questions of law presented "ultimately, and the sooner the better, must be decided by the Supreme Court" and the case "should be on its way up and not down" (R. 16785).

The decision in this case is likely to set the pattern for the application of the Federal Trade Commission Act and of Section 2 (a) of the Clayton Act to other industries in which the members concertedly maintain a noncompetitive delivered-price system. The case is far removed from the usual proceeding under the Federal Trade Commission Act to stop a particular concern from using a trade name or trade practices believed to be misleading or otherwise unfair. The substantive issues are substantially those which arise in an equity proceeding by the United States to enforce the Sherman Act, which issues

[9] The Federal Trade Commission in its letter to the Solicitor General requesting application for a writ of certiorari stated that in the Commission's opinion the desirability of applying for certiorari is "at least as great as in any case where the Commission has requested such application during the 30 years of its existence."

Congress has deemed to be of such importance that direct appeal should lie to this Court.[10]

II

The decision below is in probable conflict with applicable decisions of this Court.

The respondents have engaged in a wide variety of collective action designed to assure complete and absolute observance of their multiple basing-point delivered-price system (*supra*, pp. 11–13). The proof and the findings that respondents combined to prevent or to bring under control all practices which might impair the perfect functioning of their delivered-price system plainly warrant the inference that they combined to use and maintain the system itself. The court below nevertheless held that the Commission was not justified in making this inference, that is, that it might not predicate a finding of combination to maintain the delivered-price system upon the findings as to the acts of the respondents in implementation of their pricing system; that the materiality of such acts depended upon the establishment of a combination to use the delivered-price system and that, apart from such acts, the Commission had "failed to establish" that the respondents were parties to any combination of this kind (R. 16769, 16785, 16809). This holding was, we submit, in conflict with repeated decisions by this Court that con-

[10] Expediting Act as amended, 15 U. S. C., Supp V, 28, 29.

spiracies under the Sherman Act "may be inferred from the things actually done" and that the "essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words".[11]

The decision below, viewed as a whole, is likewise in conflict with *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, where this Court said (p. 73):

> In form the court [below] determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power.

To the same effect, see *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117.

One example will illustrate how the court substituted its judgment as to the facts for that of the

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[11] *Eastern State Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 612; *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 222–223; *American Tobacco Co.* v. *United States*, Nos. 18–20, October Term, 1945, slip op. 20.

For like decisions by lower federal courts, see the decision of the lower court in the *American Tobacco* case, 147 F. 2d 93, 107 (C. C. A. 6); *United States* v. *Pullman Co.*, 50 F. Supp. 123, 134 (E. D. Pa.); *U. S. Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. 2d 161, 162 (C. C. A. 7).

Commission. The Commission found that one of the purposes for which the Institute was organized was to maintain such "lawful trade customs and usages" as the Institute may deem advisable, and that one of the "customs and usages" to be so maintained was the multiple basing-point delivered-price system (Fng. 7 (o), R. 16000). Notwithstanding this explicit finding, supported by detailed subsidiary findings,[12] the court below declared that this "contention" of the Commission was "palpably untenable" (R. 16771). The court's reasoning appears to be that since the Institute was chartered to establish and maintain only "lawful" trade customs and usages, if it was unlawful for the Institute and its members to act in concert to maintain the multiple basing-point delivered-price system, it is to be conclusively presumed that they did not so act.

III

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U. S. 726, and *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, hold that when a producer sells at delivered prices which vary from locality to locality by reason of the use of a price basing point other than the point of production, the seller's varying net factory prices constitute price discriminations prohibited by Section 2 (a) of the Clayton Act whenever they have the effect upon competition set forth in that Section.

[12] Fng. 7 (o)–(r), R. 16000–6.

Under the findings of the Commission in the instant case, the pricing system used by respondents' non-base mills was discriminatory within the holdings in the *Corn Products* and *Staley* cases, and the court below would therefore seem clearly to have erred in failing to sustain, as to such mills, the provisions of the Commission's order (par. 3, R. 16137) prohibiting sales at discriminatory prices.

As to the base mills, this case presents a question of federal law of general importance which has not been but should be settled by this Court, namely, whether there is price discrimination within the meaning of Section 2 (a) when a seller's mill net prices vary from locality to locality (and generally without reference to differences in actual transportation costs) by reason of rigid adherence to a pricing system under which the seller's delivered price in any given locality is the same, but never lower than, the lowest combination of mill base price (including the seller's base price at point of production) plus all-rail freight. The question, stated more briefly, is whether systematic absorption of freight, just as systematic collection of phantom freight, may constitute an illegal price discrimination.

An allied question of federal law of general importance which has not been but should be settled by this Court is also presented. This question is whether a seller, if he systematically meets but never goes below the prices of his competitors (even if he is submitting a sealed bid to a public agency

for a contract on which his transportation costs are lower than those of his competitors) can justify the resulting price discrimination upon the basis that his lower prices are made "in good faith" to meet the equally low prices of competitors, within the meaning of the proviso to Section 2 (b) of the Clayton Act.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court, and it determines questions of federal law of general importance which have not been but should be settled by this Court. It is therefore respectfully submitted that the petition for writs of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947.

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